

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CURTIS JOHN-LEE BANKS,

Defendant-Appellant.

UNPUBLISHED

January 31, 2003

No. 235191

Calhoun Circuit Court

LC No. 00-002668-FH

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

Murray, P.J. (*dissenting*).

The majority concludes that defendant is entitled to a new trial because he was the recipient of the ineffective assistance of counsel during his one day jury trial held in the Calhoun County Circuit Court. Although the majority correctly concludes that defendant's trial counsel's failure to object to the admission of his confession fell below an objectively reasonable standard, trial counsel's failure to object did not prejudice defendant in light of the facts establishing his guilt beyond a reasonable doubt. Accordingly, I respectfully dissent.

I. Statement of Facts and Procedural History

The trial in this case was a short one, taking only one day with a total of only four witnesses being presented by both sides and no exhibits being submitted to the jury. In its case in chief, the prosecutor presented the testimony of Battle Creek police officer Jeffery Coons, Maryland Reid, and former Battle Creek police officer David Walters. The only witness testifying for defendant was defendant himself. In rebuttal, the prosecutor once again called Officer Coons. Following closing arguments by both counsel, the trial court instructed the jury which returned guilty verdicts the following day.

The facts set forth before the jury were rather straightforward. At approximately 11:30 p.m. on June 6, 2000, uniformed Battle Creek police officer Jeffrey Coons was patrolling the downtown Battle Creek area in a black and white marked vehicle. At a stop sign, Officer Coons spotted a gray Camaro that was passing a pickup truck at approximately 50 mph. The street on which the Camaro was driving was posted as 30 mph. After the Camaro passed, Officer Coons notified a police dispatcher that he was going to pursue the speeding Camaro. After pulling out onto the road, the pickup truck that the Camaro had passed was between Officer Coons and the Camaro. However, the Camaro aggressively turned right heading westbound down another road. Officer Coons proceeded in the same direction and activated his vehicle's overhead lights. The

Camaro then immediately turned into an alley and, as Officer Coons turned into the alley, the Camaro was already pulling over to the right-hand side of the alley while the driver was simultaneously jumping out the driver side door¹. The driver then fled on foot. Meanwhile, the Camaro continued forward and struck some trees on one side of the alley. Officer Coons stopped his vehicle, went and turned off the Camaro, and proceeded on foot in the direction of the fleeing suspect.

Officer Coons identified the fleeing suspect as a dark-complected black male, approximately 5'8", with short hair, who was wearing a blue checkered shirt and some shorts. Officer Coons noted that the suspect had proceeded in the direction of a Clark gas station. As he proceeded toward the gas station, he could not locate the suspect but saw a woman sitting on a porch. The woman, Maryland Reid, informed Officer Coons that the subject had run past her house and towards a brown apartment building located across from the gas station.

After arriving at the brown apartment building located across from the gas station,² Officer Coons questioned several persons in front of the building, none of whom matched the description of the suspect. The front apartment looked vacant, so Officer Coons proceeded to the back of the apartment building where the other apartment was located. Officer Coons knocked on the door, a woman answered, who gave him permission to enter the apartment. There were several people in the living room area, none of who matched the description of the suspect. However, when Officer Coons went into the dining room, a black male walked out of the bedroom who appeared to be the same subject who had fled the Camaro. Although the subject was only wearing white boxer shorts at the time, Officer Coons testified that he was sweating when he came out of the room. Additionally, Officer Coons testified that on the bed inside the bedroom from where the subject had exited was a blue checkered shirt matching the one the suspect had worn, and several pairs of shorts on the floor that were similar to the one worn by the suspect. Only several minutes had passed between Officer Coons leaving the Camaro and his finding defendant in the apartment.

By this time, other officers had arrived at the scene. Officer Coons returned to his vehicle to review the video tape equipment located in his police car. After partially reviewing the tape, Officer Coons was contacted by the officers on the scene who indicated that defendant had admitted to driving the vehicle. Therefore, Officer Coons discontinued reviewing the tape.

The jury was presented with testimony supporting the aforementioned facts, as well as testimony from Officer Walter to the effect that defendant admitted that he had driven the Camaro. Additionally, Maryland Reid testified that she had encountered Officer Coons and informed him that the suspect had run across her yard and towards the brown apartment. Defendant took the stand and denied that he was the driver of the Camaro and testified that he had been in that bedroom for several hours because he was "hung over" after being intoxicated the night before. As noted, the jury returned a guilty verdict on both charges.

¹ There was only one occupant in the vehicle.

² Officer Coons testified that the distance between the parked Camaro and the brown apartment building was four to five hundred feet, and that he arrived at the house within a minute or so of leaving the Camaro.

II. Ineffective Assistance of Counsel

“In order to merit reversing a criminal conviction because of ineffective assistance of counsel, the defendant must show that his trial counsel’s conduct fell below an objective standard of reasonableness and was prejudicial, thereby denying the defendant a fair trial.” *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). As previously noted, the majority correctly concluded that because defendant’s statement at the apartment was a custodial statement made without the benefit of a “Miranda warning,” *Miranda v Arizona*, 384 US 436; 86 SCt 1602; 16 L Ed 2d 694 (1996), defendant’s trial counsel’s failure to object to the statement fell below an objectively reasonable standard. However, showing insufficient performance is not sufficient to overturn a jury verdict. Under the second prong of *Strickland*³ “a defendant must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. . .’”. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). “ ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *People v Carbin*, 463 Mich 598, 600; 623 NW2d 884 (2001).

Upon review of the entire transcript, I am convinced that defendant has not established that he was prejudiced by his counsel’s failure to object to the admission of his statement. That is, in light of the evidence presented by the prosecution tying the events together for the jury, there is no reasonable probability of a different outcome had the statement not been admitted. *People v Toma, supra*. The fact that the confession took place was noted in the testimony of Officer Coons and Walters only in passing reference. The vast majority of the testimony presented to the jury surrounded the pursuit of the Camaro, and Officer Coons’ actions between turning off the Camaro and locating the defendant.

The evidence before the jury was more than sufficient to allow the jury, even without defendant’s statement, to “connect the dots” of this incident and conclude beyond a reasonable doubt that: 1) Officer Coons was in uniform and driving a marked vehicle on the day at issue; 2) the initial road upon which the Camaro was speeding and fleeing was posted at 30 mph; 3) while pursuing the Camaro, Officer Coons activated his vehicle’s overhead lights; 4) the driver of the Camaro, both before and after the overhead lights had been engaged on the marked vehicle, fled from Officer Coons by driving and then running from the scene; 5) defendant met the physical description of the suspect running from the Camaro; 6) defendant was located in the precise area where the suspect had been running toward as identified by both Officer Coons and Maryland Reid, and 7) when defendant was found, he was sweating and had in the room the shirt and shorts meeting that worn by the suspect. Although defendant generally denied all the allegations by his testimony that he had been in the room for several hours while this all transpired, there was no independent evidence contradicting that offered by the prosecutor. Accordingly, in my view, in light of the straightforward evidence presented on all the elements of the crime, defendant would have been convicted beyond a reasonable doubt even in the absence of defendant’s statement. MCL 257.602a(1) and (3). Accordingly, although not perfect, defendant received a fair trial as he was not prejudiced by counsel’s conduct. MCL 257.602a(1) and (3); *People v Toma, supra*.

³ *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

This conclusion is not altered by anything stated by the prosecutor regarding defendant's statement during closing and rebuttal argument. The record reveals that during his closing argument, the prosecutor did *not* emphasize defendant's confession. Instead, the prosecutor took the jury step by step through the elements of fleeing and eluding in the third degree, and argued to them that all the evidence presented established each of the elements and by applying common sense, they could find the defendant guilty beyond a reasonable doubt. After defendant's counsel made his closing arguments, the prosecutor gave his rebuttal. In that rebuttal, the prosecutor responded to defense counsel's argument that the confession was fabricated by the police. Most of these arguments, however, went to the credibility of defendant, who had given several statements that were subject to potential disbelief. Hence, in view of the totality of the circumstances surrounding the evidence and arguments presented by the parties, I cannot conclude that the conduct of defendant's trial counsel prejudiced him to the extent that he did not receive a fair trial. Consequently, I would affirm.

/s/ Christopher M. Murray